IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 15, 2009 Session

KAREN ROBERTS-DECKARD v. CITY OF SEVIERVILLE, TENNESSEE

Appeal from the Circuit Court for Sevier County
No. 2006-0752-II Richard R. Vance, Judge

No. E2008-01580-COA-R3-CV - FILED MAY 20, 2009

Karen Roberts-Deckard ("Plaintiff") began working for the City of Sevierville ("the City") as a dispatch operator in 1992. The City has an anti-nepotism policy prohibiting concurrent employment of spouses. In February 2004, Plaintiff married Lt. George Deckard ("Deckard"), an officer with the Sevierville Police Department. Unfortunately, Deckard was diagnosed with cancer just a few months after the marriage began. Deckard died in October 2005. Upon Plaintiff's return to work following the death of her husband, the City terminated her employment based on her violation of the anti-nepotism policy. Plaintiff then filed this suit for wrongful discharge. Plaintiff claimed that the City's anti-nepotism policy violated the State's public policy favoring the institution of marriage. The Trial Court granted the City's motion for summary judgment after finding the City was immune pursuant to the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq*. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

Andrew S. Roskind, Knoxville, Tennessee, for the Appellant, Karen Roberts-Deckard.

Nathan D. Rowell, Knoxville, Tennessee, for the Appellee, City of Sevierville, Tennessee.

OPINION

Background

Plaintiff claims in her lawsuit that she was wrongfully terminated from her employment with the City for allegedly violating the City's anti-nepotism policy. Plaintiff initially was hired by the City in April 1992 and continuously worked as a dispatch operator for the Sevierville Police Department until the City terminated her employment. While employed by the City, Plaintiff began dating Lt. George Deckard, an officer with the Sevierville Police Department. Plaintiff and Deckard began living together and eventually married in February of 2004. According to the complaint:

> Plaintiff's supervisors knew or reasonably should have known of Plaintiff's marriage to Lt. Deckard as both Plaintiff and Deckard wore engagement and wedding bands. . . .
>
> Plaintiff and her husband continued their employment with the City for nearly 18 months until Lt. Deckard succumbed to cancer in October 2005. Plaintiff remained employed by the City after Lt. Deckard's death.
>
> In August 2005, Plaintiff requested leave without pay from the City to tend to her dying husband. The City knew or reasonably should have known the purpose of Plaintiff's leave of absence. . . .
>
> Plaintiff returned to her employment with the City on or about December 3, 2005.
>
> On or about December 6, 2005, the City, by and through the City Administrator, Doug Bishop, and Sevierville Chief of Police, Don Myers, terminated Plaintiff's employment citing the City's nepotism policy . . . and Plaintiff's alleged violation thereof.
>
> The policy states in pertinent part that "no person shall be employed by the City of Sevierville for a position in any department of the City of Sevierville . . . where there is already employed by the City of Sevierville, a City employee who would fall within the definition of a 'close relative'." During their marriage, Plaintiff and her husband worked in the same department and building as defined in the policy.
>
> The policy states that one of the two employees violating the policy must voluntarily resign his/her employment. Should the employees fail to act, the City will terminate the junior employee.

> The policy offers no other course of action beyond voluntarily (sic) separation or termination.
>
> At the time of her termination from the City, Plaintiff was not in fact violating the nepotism policy, and the City, by failing to act under the policy earlier in time waived its right to act under the policy regarding this Plaintiff. (original paragraph numbering omitted)

Plaintiff then pointed out that had she and Deckard simply been living together, as opposed to being married, there would have been no violation of the policy. Plaintiff maintained that such a result violates Tennessee public policy by favoring unmarried couples over married couples.

Plaintiff asserted two claims in her complaint. Specifically, Plaintiff claimed that her wrongful discharge amounted "to a breach of contract" and also constituted "the common law tort of wrongful discharge."[1] Plaintiff sought an unspecified amount of monetary damages and to be reinstated to her former position with the City.

The City responded to the complaint by filing a motion to dismiss or, in the alternative, motion for summary judgment. The basis for the City's motion was twofold. First, the City claimed it was immune from a claim for common law wrongful discharge pursuant to the provisions of the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101, *et seq*. Second, the City claimed that Plaintiff was an at-will employee and, therefore, failed to state a claim for breach of contract.

In support of its motion, the City filed the affidavit of Doug Bishop, the City Manager. Bishop asserted that pursuant to the City's personnel rules and regulations, which Plaintiff had received, Plaintiff was an at-will employee. Bishop also attached to his affidavit a copy of the at-will employment policy, as well as the policy prohibiting employment of close relatives in the same department.[2] These policies provide, in relevant part, as follows:

> **Section 1. Policy Statement**
>
> (A) The employment relationship between the City and the employee is terminable at the will of either at any time and with or without cause and with or without notice. No policy or provision contained herein shall alter the "at will" nature of the employment relationship between the City and the employee. No employee, officer, agent or representative of

[1] Plaintiff later amended her complaint to change the description of her tort claim from "common law tort of wrongful discharge" to "wrongful discharge".

[2] Plaintiff's personnel file contained a signed acknowledgment that she received a copy of these personnel policies.

the City has any authority to enter into any agreement or representation, verbally or in writing, which alters, amends or contradicts this provision or the provisions in these policies. Any exception to this policy of "at will" employment must be expressly authorized in writing, approved by the Board of Mayor and Aldermen and executed by the officers designated by the Board of Mayor and Aldermen.

(B) None of the benefits or policies set forth in these policies is intended because of its publication to confer any rights or privileges upon employees or to entitle them to be or remain employed by the City. The contents of this document are presented as a matter of information only. These personnel policies are not and do not create a contract of employment, but are a set of guidelines for the implementation of personnel policies. The City explicitly reserves the right to modify any of the provisions of these policies at any time. Not withstanding (sic) any of the provisions within these policies, employment may be terminated at any time, either by the employee or by the City, with or without cause and with or without advance notice. . . .

* * *

Section 13. Limitation of Employment of Relatives

A. No person who is a close relative of an employee or member of the Board of Mayor and Aldermen of the City of Sevierville shall be eligible for employment by the City of Sevierville. "Close Relative" means a person who is related to the principal person as a spouse, child, grandchild, parent, grandparent, brother, sister, aunt, uncle, nephew or niece by blood, brother-in-law, sister-in-law, "step" relatives and adoptive ones. The brother-in-law and sister-in-law restriction does not include the husband or wife of an existing employee's spouse's sister or brother. This restriction on the employment of close relatives shall also apply to more distant relatives who are living in the same household of an existing employee or Board of Mayor and Aldermen member.

B. When two employees become married to each other, one of them will be required to terminate his or her employment with the City of Sevierville. If the employees fail to determine which of the two will terminate his or her employment within

> two weeks from the day of the wedding, the less senior of the two employees will be terminated. . . .

Plaintiff opposed the City's motion for summary judgment and filed her own motion for summary judgment. In this motion, Plaintiff argued:

> i) [Plaintiff's] cause of action of wrongful discharge is by nature a contractual claim. The GTLA does not apply to contract claims and therefore does not bar Plaintiff's claim of wrongful discharge.
>
> ii) [Plaintiff], although an at-will employee, is entitled to bring a common law wrongful discharge claim against the City of Sevierville because the reasons for the discharge violated a clear and unambiguous public policy of the State of Tennessee, i.e., the support and maintenance of the institution of marriage within the State.

Following a hearing on the competing motions for summary judgment, the Trial Court entered an order granting the City's motion for summary judgment. The Trial Court found that Plaintiff's wrongful termination claim sounded in tort rather than contract, and that the City was immune from that tort pursuant to the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq*. The Trial Court did not address whether the anti-nepotism policy violated public policy of the State of Tennessee.

Plaintiff appeals raising two issues, which we quote:

> I. Whether the trial court correctly held that a wrongful discharge claim sounds in tort rather than contract when the relationship between employer and employee is contractual in nature and the only available remedies under Tennessee law are "contract" damages as opposed to tort damages.
>
> II. Whether the trial court erred in granting the City's motion without specifically ruling on the issue of whether the City violated Tennessee public policy when it fired [Plaintiff] when the State has taken affirmative, unambiguous steps to protect the sanctity of marriage.

Discussion

In a recent Tennessee Supreme Court opinion, the Court granted permission to appeal in order "to provide further guidance regarding the application of summary judgment in this State." *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76, 82 (Tenn. 2008). The Court stated as follows:

> The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party fails to make this showing, then "the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails." *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88.
>
> The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5. Both methods require something more than an assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, 270 S.W.3d at 5. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004). If the moving party is unable to make

the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215.

> If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:
>
> > (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.
>
> *McCarley*, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.*
>
> Because the resolution of a motion for summary judgment is a matter of law, we review the trial court's judgment de novo with no presumption of correctness. *Blair*, 130 S.W.3d at 763. In addition, we are required to review the evidence in the light most favorable to the nonmoving party and to draw all reasonable inferences favoring the nonmoving party. *Staples*, 15 S.W.3d at 89.

Martin, 271 S.W.3d at 83-84.

We first address whether Plaintiff's wrongful discharge claim is a claim sounding in tort or in contract.[3] When arguing that a wrongful discharge claim is a contract claim, as opposed to a tort claim, Plaintiff relies heavily on the unreported opinion in *Johnson v. Johnson*, No. 01-A-01-9204-CV-00166, 1992 WL 184743 (Tenn. Ct. App. Aug. 5, 1992) *perm. app. denied Dec.*

[3] Plaintiff does not deny that she was an at-will employee.

7, 1992, concurring in results only. The *Johnson* opinion does support Plaintiff's position. However, that opinion has no precedential value.

In *Baines v. Wilson County*, 86 S.W.3d 575 (Tenn. Ct. App. 2002), this Court was confronted with the very same argument, which also relied on *Johnson*. We rejected both the argument that retaliatory discharge was a claim sounding in contract, as well as any reliance on the *Johnson* opinion. We stated:

> [T]he defendants have cited *Johnson v. Johnson*, No. 01-A-01-019204CV00166, 1992 WL 184743, at * 2 (Tenn. Ct. App. Aug. 5, 1992) (Perm. app. denied, concurring in results only). Although Mr. Baines did not introduce *Johnson* into the discussion, he does point out that one of its findings is that a retaliatory discharge claim sounds in contract. Therefore, he argues that if this court should decide that the claim is a contract cause of action rather than tort, then we should find that the GTLA immunity does not apply. We decline to find that a claim based on retaliatory discharge is a breach of contract action because *Johnson* has no precedential value and because our courts have consistently described the common law retaliatory discharge cause of action as a tort.
>
> An opinion which is designated denied concurring in results only ("DCRO"), now called "Not for Citation," "shall not be ... cited by any judge in any trial or appellate court decision, or by any litigant in any brief ..." except in limited circumstances which are not present herein. Tenn. R. S. Ct. 4. Therefore, the *Johnson* opinion may not be relied on by either party or this court, and we decline to consider it as the basis for any holding.
>
> Our courts have repeatedly described this cause of action as a tort. *See Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997); *Chism v. Mid-South Milling Co., Inc.*, 762 S.W.2d 552 (Tenn. 1988); *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470 (Tenn. 1986); *Van Cleave v. McKee Baking Co.* 712 S.W.2d 94 (Tenn. 1986); *Clanton*, 677 S.W.2d at 441; *Montgomery*, 778 S.W.2d at 444 (applying the GTLA to hold the government immune). In addition, in *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992), the court held that punitive damages, which are appropriate in tort actions and not in contract actions, are available in a suit for retaliatory discharge.

Baines, 86 S.W.3d 579, 580 at n.2.

Based on *Baines* and the numerous cases cited therein, we reject Plaintiff's argument that a wrongful discharge claim is a claim sounding in contract, as opposed to tort. Plaintiff

acknowledges the weakness of her argument in her brief wherein she states: "Contrary to the holdings of various Tennessee appellate courts and the Tennessee Supreme Court, retaliatory discharge sounds in contract rather than tort." We decline Plaintiff's invitation for this Court to tell the Supreme Court that it is wrong. Even if this Court disagreed with the Supreme Court's analysis in these cases, which we do not, we are, nevertheless, bound to follow the decisions of that Court. If Plaintiff desires to pursue this argument further, she can seek review of this Opinion by the Supreme Court.

Although not stated exactly as such, Plaintiff's second issue is her claim that the City's policy prohibiting nepotism violates Tennessee public policy and the Trial Court erred by never reaching this issue. In *Sloan v. Tri-County Electric Membership Corp.*, No. M2000-01794-COA-R3-CV, 2002 WL 192571 (Tenn. Ct. App. Feb. 7, 2002), *no appl. perm. appeal filed*, this Court addressed the very issue of whether an anti-nepotism policy prohibiting concurrent employment of spouses violated a public policy favoring marriage. We held that it did not.[4] We stated:

> The United States Court of Appeals for the Sixth Circuit has examined the anti-nepotism policies of public employers in several cases alleging that employment actions taken pursuant to such policies infringed upon an individual's First Amendment associational right to marry. *See Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703 (6th Cir. 2001); *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996); *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130 (6th Cir. 1995).
>
> In *Montgomery*, the court determined that the school system's anti-nepotism policy, requiring transfer of one spouse if employees married, was not a direct and substantial infringement upon the right to marry and, consequently, was subject to a rational basis analysis. *Montgomery*, 101 F.3d at 1125. The court noted that virtually every court to have confronted a constitutional challenge to an anti-nepotism policy had applied rational basis scrutiny and had concluded that those policies passed constitutional muster. *Id*. at 1126, 1131. The court found the justifications put forward in support of the policy, including avoidance of friction and disharmony, represented a legitimate governmental interest and concluded the policy was not an irrational means for securing those interests. *Id*. at 1130.
>
> In *Vaughn*, a challenge to a governmental employer's anti-nepotism policy which required termination of one spouse if employees married, the court followed the holding in *Montgomery*

[4] In *Sloan*, as in the present case, the anti-nepotism policy required one spouse to resign. *Sloan*, 2002 WL 192571, at *1.

while recognizing that the policy at issue provided more severe repercussions than the one in *Montgomery*. The court found that the policy imposed only a non-oppressive burden on the decision to marry. *Vaughn*, 269 F.3d at 712. The policy did not bar the two employees from getting married; it only made it economically burdensome to marry someone in a small group of people, co-employees. *Id.* The court found that the purposes of the anti-nepotism rule met the rational basis standard and that the rule advanced a legitimate governmental interest. *Id.* Among those purposes were "(1) to prevent one employee from assuming the role of 'spokesperson' for both, (2) to avoid involving or angering a second employee when an employee is reprimanded, (3) and to avoid marital strife or fraternization in the workplace." *Id.* The court specifically noted that a government employer may have a legitimate concern about the inherent loyalty between spouses, making discipline more difficult. *Id.*

Similarly, the court in *Wright* found the anti-nepotism policy was rationally related to legitimate government interests in avoiding potential conflicts and in preventing deterioration of morale. *Wright*, 58 F.3d at 1136; *see also Parks v. City of Warner Robins, Georgia*, 43 F.3d 609, 615 (11th Cir. 1995) (upholding anti-nepotism policy as means of "avoiding conflicts of interests between work-related and family-related obligations; reducing favoritism or even the appearance of favoritism; preventing family conflicts from affecting the workplace ...").

* * *

Tennessee has no statute regulating private employers' decisions to employ, refuse to employ, or employ under certain conditions, people who are married to each other. Tennessee has not chosen to include spouses who want to work together in the groups given statutory protection against employment discrimination. The Tennessee Human Rights Act is intended to "safeguard all individuals within the state from discrimination because of race, creed, color, religion, sex, age or national origin in connection with employment...." Tenn. Code Ann. § 4-21-101(a)(3).

* * *

Not only has the Tennessee General Assembly not legislated any restriction on a private employer's decision not to employ spouses, it has actually placed a limitation on employment of relatives in government positions. Tenn. Code Ann. §§

> 8-31-101-107. Known as the Tennessee State Employees Uniform Nepotism Policy Act of 1980, this set of statutes prohibits supervision by one relative of another. Tenn. Code Ann. § 8-31-103. Relative includes spouse, and when employees violate the prohibition as a result of a marriage, such violation is to be resolved by transfer or resignation. Tenn. Code Ann. § 8-31-104. Thus, to the extent the General Assembly has spoken to anti-nepotism policies, it has not expressed a disapproval of them as a prerogative of employers.
>
> Ms. Sloan has provided no clear mandate opposing anti-nepotism policies which prohibit concurrent employment of spouses. Her reliance on Tennessee's policy favoring marriage is misplaced. We agree with the authorities discussed above that a limitation on employment of spouses is not an action based upon marital status. Tri-County's policy does not allow employment action based on whether an employee is married or unmarried. Its policy prohibiting concurrent employment of spouses does not contravene the state's public policy favoring marriage.
>
> Accordingly, we affirm the trial court's dismissal of Ms. Sloan's claim because she has failed to allege the elements necessary to sustain a cause of action for wrongful or retaliatory discharge in violation of clear public policy. . . .

Sloan, 2002 WL 192571, at *4 - 7 (footnotes omitted). *See also* Op. Tenn. Att'y Gen. 06-101 (June 14, 2006) ("employment of spouses, one of whom is in the direct line of supervision of the other, violates the [Tennessee State Employees Uniform Nepotism Policy Act]").

We agree with the analysis in *Sloan* and the cases cited therein and likewise find that Plaintiff has "failed to allege the elements necessary to sustain a cause of action for wrongful or retaliatory discharge in violation of clear public policy." *Sloan*, 2002 WL 192571, at *7. Therefore, even if the Trial Court had reached this issue, the City, nevertheless, was entitled to summary judgment.

Finally, we note that Plaintiff assumes that if her claim is a tort claim, then that claim would be allowed to proceed if there was a violation of clear public policy by the City. This assumption completely ignores the holding of the Trial Court that the City was immune pursuant to the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq*. Nowhere in her brief does Plaintiff argue or cite any authority in support of her conclusion that even if her claim is a tort claim, because there was a violation of clear public policy by the City, then the Trial Court erred in finding the City immune under the Tennessee Governmental Tort Liability Act. Having said that, because we find that the City's anti-nepotism policy does not violate clear public policy, we need not address this unsupported conclusion by Plaintiff, and we express no opinion on that issue.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court solely for the collection of costs below. Costs on appeal are taxed to the Appellant, Karen Roberts-Deckard, and her surety, for which execution may issue, if necessary.

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D. MICHAEL SWINEY, JUDGE